BRESSLER, AMERY & ROSS (JMR 5116)
A Professional Corporation
17 State Street
New York, New York 10004
(212) 425-9300
Attorneys for Defendant
Morgan Stanley DW, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRIC KILKENNY, Plaintiff, v. GREENBERG TRAURIG, LLP AND MORGAN STANLEY, INC., YVONNE TRIMARCHI and KAREN MORITA, Defendants.	05 CV 6578 (NRB) **AFFIDAVIT OF J. MICHAEL RIORDAN**

STATE OF NEW JERSEY)
) SS:
COUNTY OF MORRIS)

I, J. MICHAEL RIORDAN, of full age, being duly sworn according to law, and upon my oath depose and say:

1. I am an attorney at law of the State of New Jersey and a shareholder of the firm of Bressler, Amery & Ross, P.C., attorneys for Defendant Morgan Stanley DW, Inc. ("Morgan Stanley") in the above-captioned matter. As such I am fully familiar with the facts and circumstances in this case. I submit this Affidavit in support of Defendant Morgan Stanley's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and for sanctions pursuant to Fed. R. Civ. P. 11.

Dockets.Justia.com

2. Attached hereto as Exhibit A is my letter to Plaintiff dated August 25, 2005.

I hereby affirm that the foregoing statements made by me are true and correct. I am aware that if such statements are willfully false, I am subject to punishment.

J. Michael Riordan (JMR 5116)

Sworn and subscribed to
before me this 28 day
of September 2005

Monika R. Velasco
Notary Public

MONIKA R. VELASCO
NOTARY PUBLIC OF NEW JERSEY
COMMISSION EXPIRES AUG. 27, 2008

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EXHIBIT A

BRESSLER, AMERY & ROSS, P.C.
ATTORNEYS AT LAW
P.O. BOX 1980
MORRISTOWN, NJ 07962
(973) 514-1200
FAX: (973) 514-1660

HAND DELIVERY:
325 COLUMBIA TURNPIKE
FLORHAM PARK, NJ 07932

www.bressler.com

NEW YORK OFFICE
17 STATE STREET
NEW YORK, NY 10004
(212) 425-9300

FLORIDA OFFICE
HUNTINGTON CENTRE II
2801 S.W. 149TH AVENUE
MIRAMAR, FL 33027
(954) 499-7979

BERNARD BRESSLER*
BRIAN F. AMERY*
LAWRENCE D. ROSS*
DAVID W. REGER+
J. MICHAEL RIORDAN*
RICHARD V. JONES+
RICHARD R. SPENCER, JR.+
MARK T. McMENAMY+
DAVID P. SCHNEIDER+
MARK M. TALLMADGE+
EDWIN A. ZIPF+
THOMAS L. WEISENBECK*
GEORGE R. HIRSCH*
CYNTHIA J. BORRELLI*
ERIC L. CHASE*
DAVID H. PIKUS*
JORDAN S. WEITBERG*
DAVID J. LIBOWSKY*
DONALD J. CAMERSON, II+
DAVID F. BAUMAN+
KEVIN B. WALKER+
DOMINICK F. EVANGELISTA*
GENEVIEVE K. LAROBARDIER*
NANCY C. McDONALD+
LAWRENCE E. FENSTER△
SAMUEL J. THOMAS*
LINDA S. MIRSKY*
DIANA C. MANNING*
BENNETT FALK°
KEITH OLIN□
ALEX J. SABO□
FRANK J. CUCCIO*

COUNSEL
KENNETH M. MOLTNER△
MICHAEL J. CONNOLLY+
DOUGLAS C. FURLONG+
DANIEL T. KOPEC*

JONATHAN M. PRINCE+
DANIEL R. KORB, JR+
JAMES P. GIANAKIS+
RICHARD J. TEER*
MICHAEL S. RUBIN+
HUGO A. HILGENDORFF IV*
KIRSTEN McCAW GROSSMAN*
KAREN E. MURPHY+
MATTHEW C. PLANT*
KARL L. MARQUARDT*
KALMAN G. MAGYAR*
JILL E. DOKSON□
IZABELA C. REIS△
ROBIN C. STEPHAN△
ERIKA SCHNEIDER DOWNES*
STEVEN G. HEMMERT□
ARISTOTLE G. M'RZAIAN*
JOHN D. MILLER, III+
ELYSSA S. KATES*
BRIAN D. DONNELLY+
DANIEL J. REISER△
ANGELA M. SCAFURI+
CHRISTOPHER M. GALUSHA+
DENNISE S. MULVIHILL*
JASON M. SCHOENBERG+
COREN H. STERN°
SETH V. ALHADEFF□
CARLA DUQUE*
MICHELLE I. BOUGDANOS*
BENJAMIN J. DiLORENZO+
DIANA C. CAMPBELL△
THOMAS A. McKINNEY+
DAVID G. SMITHAM*
DOUGLAS B. LIPSKY*
YOONSUN CHUNG*
NIKOLAS S. KOMYATI*
REGINA C. PEPE*
RICKI L. RHEIN*
AMY J. BOWMAN*
DIANA M. HEDRICK□
MARIE SARACENI+
CHRISTOPHER G. MASSEY*
JACQUELYN R. TRUSSELL*
JONATHAN L. CASSADY+
MATTHEW E. WOLPER□

*ADMITTED IN NJ AND NY
+ADMITTED IN NJ
△ADMITTED IN NY
□ADMITTED IN FL
°ADMITTED IN FL AND NY

WRITER'S DIRECT INFORMATION:

August 25, 2005

Via Federal Express
Patric Kilkenny, pro se
60 Cox Avenue
Armonk, NY 10504

Re: Patric Kilkenny v. Greenberg Traurig, LLP and Morgan Stanley, Inc., et al. Civil Action No. 05-cv-6578 (NRB)

Dear Mr. Kilkenny:

This firm represents Defendant Morgan Stanley, Inc. ("Morgan Stanley") in the above-referenced matter. Please consider this correspondence a formal demand pursuant to Rule 11 of the Federal Rules of Civil Procedure to immediately dismiss the Complaint with prejudice as to Morgan Stanley. Also, we have spoken with Greenberg Traurig's counsel, and they join us in this letter (a copy of Fed.R.Civ.P. 11 is attached for your convenience).

This Complaint arises from your employment relationship with co-Defendant Greenberg Traurig. At no point during the relevant period of time did Morgan Stanley employ you or have any control over the terms of your employment. You therefore lack standing to bring the claims asserted against Morgan Stanley in the Complaint. Also, no basis exists for your claims against Morgan Stanley.

Based upon the foregoing, we hereby demand that you immediately agree to dismiss the Complaint with prejudice against Morgan Stanley. If you fail to dismiss the Complaint within seven (7) days, we will file an appropriate motion with the Court to address this issue and consistent with Rule 11 the Court, in its discretion, may assess monetary sanctions. See Fed.R.Civ.P. 11(c).

Very truly yours,

J. Michael Riordan

JMR/rlk
cc: Martin Kaminsky, Esq. (via telefax)

GAP Report on Rule 9(h). No changes have been made in the published proposal.

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

ADVISORY COMMITTEE NOTES

1937 Adoption

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat., 1930, § 5513; Smith-Hurd Ill.Stats. ch. 110, § 157(2); N.Y.R.C.P., (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P., (1937) Rule 90. For written instruments as exhibits, see Smith-Hurd Ill.Stats. ch. 110, § 160.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

ADVISORY COMMITTEE NOTES

1937 Adoption

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin*, L.R. 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as: U.S.C., Title 28:

§ 381 [former] (Preliminary injunctions and temporary restraining orders)

§ 762 [now 1402] (Suit against the United States)

U.S.C., Title 28, § 829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of former rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see 12 P.S.Pa. § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, C.C.A.3, 1934, 69 F.2d 294.

1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64–65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, **Federal Practice** ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir.1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and